APPEAL NO. 171273
FILED JULY 20, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 4, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. S) on September 4, 2015, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the appellant (claimant) reached MMI on August 4, 2015; (3) the claimant's IR is five percent; (4) the claimant had disability from an injury sustained on (date of injury), from August 5, 2015, through April 11, 2016; and (5) the claimant is not entitled to reimbursement of travel expenses from April 18 through September 21, 2016, for medical treatment at the direction of (Dr. Sm) and (Dr. B), approximately in the amount of $1,500.00.

The claimant appealed, disputing the hearing officer's determinations of finality, MMI, IR, and travel reimbursement. The claimant contends that the evidence established the first certification did not become final and the evidence precludes a determination that he reached MMI on August 4, 2015, with a five percent IR. Additionally, the claimant argues that the preponderance of the medical evidence supports his position that he is entitled to reimbursement of travel expenses from April 18 through September 21, 2016. The respondent (carrier) responded, urging affirmance of the disputed finality, MMI, IR, and travel reimbursement determinations.

The hearing officer's determination that the claimant had disability from an injury sustained on (date of injury), from August 5, 2015, through April 11, 2016, was not appealed and became final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that consisted of a lumbar strain, lumbar radiculopathy, and lumbar disc herniations at L3-4, L4-5, and L5-S1, and that the date of statutory MMI is April 12, 2016. The claimant testified that he injured his back when an out-of-control pressure hose struck him in the back.

TRAVEL REIMBURSEMENT

The hearing officer's determination that the claimant is not entitled to reimbursement of travel expenses from April 18 through September 21, 2016, for medical treatment at the direction of Dr. Sm and Dr. B, approximately in the amount of $1,500.00 is supported by sufficient evidence and is affirmed.

FINALITY

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means: that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. The hearing officer found that "[n]o exceptions to 90-day finality per Section 408.123(f) apply." That finding is supported by sufficient evidence.

In her discussion of the evidence the hearing officer noted that based upon the claimant's testimony, the report from Dr. S was deemed received by the claimant late in 2015. The hearing officer found that at least by December 31, 2015, the claimant received notification by verifiable means of the September 4, 2015, certification report by Dr. S. The claimant testified that he did not remember the exact date he received the certification of MMI/IR from Dr. S but knew he got it in 2015. The claimant never testified that he received the documents on December 31, 2015, and there is no evidence that December 31, 2015, is the date of receipt by verifiable means. The claimant acknowledged receipt of the report but equally clearly he did not know or testify to the specific date of receipt nor does the carrier have verifiable proof that the first certification of MMI and IR was delivered on December 31, 2015. We hold that the claimant's testimony in this case does not constitute acknowledged receipt by the claimant on December 31, 2015. *See* Appeals Panel Decision (APD) 141822, decided October 10, 2014; APD 101033, decided September 22, 2010; and APD 110911, decided August 26, 2011.

In evidence is product and tracking information for a tracking number for documents sent to the claimant's address from the United States Postal Service that reflects on October 2, 2015, documents were available for pickup. The hearing officer noted in her discussion that in evidence was the tracking information confirming that the certification report was sent on September 28, 2015, but not picked up as of October 2, 2015. However, the hearing officer did not comment on whether she was persuaded

that the documents available for pickup included the September 4, 2015, DWC-69 from Dr. S.

In APD 042163-s, decided October 21, 2004, the Appeals Panel discussed whether the deemed receipt provision of Rule 102.4 was applicable and what is meant by "verifiable means." APD 041985-s, decided September 28, 2004, and APD 042163-s, both reference the preamble to Rule 130.12. The preamble provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification."

The preamble goes on to state:

> Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. This may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by e-mail, confirmed delivery by facsimile, or some other confirmed delivery to the home or business address. The goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex Reg 2331, March 5, 2004.

The preamble further stated that a party may not prevent verifiable delivery and specifically provided that a party who refuses to take personal delivery or certified mail has still been given verifiable written notice. When or if the notice was provided/delivered to the claimant presented a question of fact for the hearing officer to resolve. APD 042163-s, *supra*. Consequently, we reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. S on September 4, 2015, became final pursuant to Section 408.123 and Rule 130.12 and remand the issue of finality to the hearing officer for her to make a determination regarding delivery of the first certification to the claimant by verifiable means.

MMI/IR

Given we have reversed and remanded the issue of finality to the hearing officer for further action consistent with this decision we also reverse and remand the issues of MMI and IR.

SUMMARY

We affirm the hearing officer's determination that the claimant is not entitled to reimbursement of travel expenses from April 18 through September 21, 2016, for medical treatment at the direction of Dr. Sm and Dr. B, approximately in the amount of $1,500.00.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. S on September 4, 2015, became final under Section 408.123 and Rule 130.12 and remand the issue of finality to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on August 4, 2015, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is five percent and remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to make a determination regarding whether the first certification of MMI and assigned IR from Dr. S on September 4, 2015, was delivered to the claimant by verifiable means and if so on what date. The claimant's testimony that he received the certification in 2015, does not support a finding that at least by December 31, 2015, the claimant received the certification by verifiable means. After making a determination regarding finality, the hearing officer is to then make a determination of MMI and IR supported by the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier **is ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge